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United States Circuit Court of Appeals

For the Ninth Circuit

OSCAR SPORGEON,
Plaintiff in Error,

vs.

ANDREW F. MAHONEY et al.,
Defendants in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

S. T. HOGEVOLL,
Pacific Building, San Francisco,
Attorney for Plaintiff in Error.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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The plaintiff in error respectfully submits that facts as set forth by the defendants in error are so misleading that it is necessary for the plaintiff in error to contradict the same. Since the facts are in dispute we must file a reply brief in order that the court may be able in a quick manner to determine which one is correct.

Fact 1. The defendants in error say on page 3 of their brief:

> "The evidence showed that the ringbolt was not intended for the purpose of moving cargo, but was for the purpose of lashing booms or lashing cargo to the deck, or for stopping lines."

The court can get the best idea of the matter by reading the following statement which was made by

witness Ainsworth on page 40 of the transcript. He says:

> "The ringbolt, defendants' exhibit 1, is what they call a ringbolt with a lag screw, and it is used for various purposes on ships to secure articles on ships." (T. 40.)

The witness uses the very important language:

> "One cannot tell by looking at it, except from below, if this bolt was clinched under deck."

It was the defendants in the construction of the vessel which used this bolt for a purpose for which it was not intended. Even their own witness, Captain Lancaster, so testified on page 55 of the transcript, when he said:

> "They (the ringbolts) are not to be used for moving cargo, because they are not proper bolts in deck construction."

Plaintiff did not know that bolts that are "not proper in deck construction" were used on the deck. Plaintiff said:

> "Seamen, sir, do not use that kind of bolts for any purpose, for heaving, for lashing, or holding, because that bolt is unsafe to be on board a ship."

The respondents say on page 10 in the brief:

> "We recognize that the plaintiff's statement must be taken as true for whatever it is worth in determining the correctness of the court's ruling in directing the verdict for the defendants."

Witness Ainsworth said:

> "The ringbolt, defendant's exhibit one, is what they call a lag screw, and it is used for various purposes to secure articles on ships."

But the plaintiff did not know that a bolt not intended for moving cargo, was placed in the deck department where it was not proper to place such a bolt.

The respondents say:

> "There is no evidence of any custom obtaining for the use of this bolt for the purpose of moving cargo." (Brief page 10.)

That is absolutely correct. The custom was just the other way, namely to use a bolt that was safe. The custom must have been as Captain Lancaster said: The ringbolts are not proper bolts in deck construction. (55) We think that the custom is to have "proper bolts in deck construction."

Again the respondents say:

> "Proper equipment was provided for the purpose of moving cargo".

Plaintiff testified:

> "The reason I put the line around this particular bolt is this: When we started to heave the load aft the deck, and the first that happened was that the line jumped off the particular spool in the corner, she jumped clean out and nearly knocked my head off. That is the reason I had to put it in the ring bolt to hold it down". (T. 73.)

If the plaintiff had been able to get a snatch block and if the bolt had been a customary bolt,

clenched below, the equipment would have been proper. Plaintiff had no time to screw out a bolt and find out that it was only seven inches, and not clenched below, he had to hurry, because the mate "came around and cursed and swore at the second mate because the lumber was not coming fast enough". (T. 46, at the top of page.)

It is an absolute fact, we heartily agree with the respondents, that this ringbolt was used for a purpose for which it was not intended. But it was "used" by the respondents who put it there where it was not proper in deck construction.

The following is also testimony by the defendants' witness Finck, and shows how entirely mistaken the defendants in error are when they say that the plaintiff used the ringbolt for a purpose for which it was not intended.

Witness Finck says:

> "In all my experience I have never seen a line led through a ringbolt and around a lead to the windlass *without the use of a block.*" (T. 67.)

This shows that a lead was run through a ringbolt even from the testimony of a witness for the defendants, but not without the use of a block.

It was this block which was denied the plaintiff. (T. 28.)

Witness Becker for the defense testified:

> "The other way is to take the wood, tie it fast to the lead, put a snatch block on the lead pull it back with the quarter chock, go ahead

> with the winch, and then load it wherever you want to."

Notice that the witness says "Put a snatch block on the load."

This block was denied the plaintiff. (T. 28.)

Witness Cleaver for the defendants testified also to the effect that a ringbolt is used in connection with a snatch block as follows:

> "It would not be safe, the rope would give way, if there is no fair lead, if there is no snatch blocks". (T. 53.)

Both the court on page 78 of the transcript and the respondents on page 11 of their brief say that the plaintiff in error misstates the testimony of witness Lauritzen. Counsel is still of the opinion that he interpreted Lauritzen's testimony correctly and that the court as well as the opposing counsel are the ones who misunderstood his testimony. We contend that Lauritzen intended to say and did say just what the plaintiff and witness Lancaster said (T. 54) that such a bolt was not proper "in deck construction", as it was not clenched below. Lauritzen was called as a witness for the defendants, and the counsel for the defendants on direct examination did not ask one question indicating that the plaintiff did not properly use the appliances. This, among other matters in his testimony, indicates to us that the counsel at that time knew that his testimony would be adverse, but on cross-examination Lauritzen said:

"Q. You have been a winch driver for many years, haven't you?

A. Yes, sir. For several years.

Q. And saw them use this particular bolt in many places the same as it was used that time, it was nothing unusual?

A. They usually lead the way it will lead best.

Q. And do not stop to make an inquiry, Mr. Lauritzen, if the ringbolt is fastened enough; they take it for granted it is solid enough?

A. Yes, sir.

Q. And at this time fastened the way it was, you took it for granted it was like any other bolt on the ship?

A. Yes, sir.

Q. And if it hadn't been the same way it was generally done you would have known it, because you have been a winch driver for many years?

A. I guess so."

This is the tesitmony of Lauritzen whom the respondents claim testified that the plaintiff made an improper use of the appliances, and which we claim is in plaintiff's favor.

The respondent contends that Lauritzen meant that by reason of the position on the deck that the plaintiff should have known better than using it, but from the following testimony it is clear that the witness meant that no one used such a bolt at such a place.

This appears from the redirect examination by the attorney for the defendants, as follows:

"Q. You never saw a bolt used like this before this time for that purpose, did you?

A. I could not say exactly that I had, not a bolt like that. There are so many different kinds of bolts on a ship." (T. 23.)

It was only after the bolt was pulled out that Lauritzen found anything unusual with the bolt, and he said:

"I remember I took up the bolt and said, 'No wonder it pulled out,' because I thought it was rather small. I don't remember seeing one used like that for that purpose." (T. 24.)

From the fact that witness said "like that" for that purpose, after he had seen that it was so small, this shows that he referred to the owners using the bolt and not to plaintiff.

"I thought it rather small for the use to which it was put", said Lauritzen. (T. 24.)

The bolt was too short, and that is why Lauritzen said that he had never seen anybody use such bolt for such purpose. That could only be seen after it was pulled out.

It is reasonable that when he said that he thought that it was rather small for the use to which it was put, he meant that it was too short. Witness Aezer, who repaired the bolt, said:

"I lengthened it from seven to seventeen inches and put a nut on the end and put it back in the hole." (T. 47.)

Notice that he did two things, made it three times as long as it was, minus one inch, and put a nut on it.

That made the bolt three times as large. The argument has been made by the defendants in error that the ringbolts were used to fasten the booms to. The respondent says:

> "A ringbolt is used for stoppers for lines, for mooring lines, it is sometimes put there to make booms fast." (T. 57.)

See respondent's brief page 12.

The above may be true but it does not rebut the fact that the ringbolts were used just as plaintiff used them. If we take a look at a drawing on page 36 of the transcript, we can see at once that the ringbolts are not so placed as a man would place them in order to fasten the booms to the boom rest. Notice that the two bolts are far from the boom rest. They are in front of the boom rest and to one side. If they had been intended for the boom rest they would have been placed one on each side of it, and not far in front and both on one side.

The defendants in error make a grave mistake when they claim on page 17 of their brief that:

> "It is not disputed that plaintiff was in charge of the work and selected his own method of using the ship's equipment."

The plaintiff testified:

> "There was another way of doing it, if the mate would have given me time to rig up the gears." (T. 73.)

Witness McFadden said:

> "In the meantime the first mate had come around, and cursed, swore at the second mate,

> because the lumber was not coming fast enough." (T. 45, at the bottom of page.)

The defendants' counsel are not familiar with the testimony. If they had been they would not, if we know them right, have made such an unfounded statement as the one just cited.

> "We recognize," says the brief of the respondents on page 10, "that the plaintiff's statement must be taken as true, for whatever it may be worth, in determining the correctness of the court's ruling in directing the verdict for the defendants." (Defendants' brief page 10.)

The above is undoubtedly true.

A peculiar argument is made on page 19 in the brief of the respondent. It is this:

> "6. Even if the bolt were loose which does not appear, it was the plaintiff's duty to inspect it."

The argument is based on the testimony of one of the owners of the vessel, Mr. Mahoney, who said that it was the mate's duty. Mr. Mahoney said: "The mate would have to know if the bolts and screws were not in shape." Mr. Mahoney testified:

> "We leave it to the captain to look after the deck department; he in turn instructs the mate, if there is anything wrong, to report to him, and he in turn reports to the superintending engineer, who is a practical man and he in turn goes and looks her over." (T. 70.)

Mahoney says:

> "I told no one to look after these bolts." (T. 71.)

But the master knew they were not clamped, and just screwed down in the deck, and he did not tell Sporgeon about it. (T. 52.)

The manner of fastening the bolts was so dangerous that the court said:

> "Because they (the ringbolts) are liable to turn or screw out and the friction is likely to tear them loose, as was done in this case." (T. 76.)

It seems so reasonable that when the master on the vessel knew the way the bolts were fastened, that he should have told the second mate about it, but instead the master said:

> "I would say you could use it for discharging a load or two like he did."

It seems strange to us that the plaintiff is accused of negligence for doing just what the master said could be done.

REPLY TO THE LEGAL ARGUMENTS.

There is no denial of the fact that the law requires a greater degree of care of a shipowner than of a landsman, on which point we cited many cases in our brief. There is no denial of our point to the effect that the court was mistaken in law when the court said that the degree of care of a shipowner and a landsman was the same. There is no denial of the fact that the court had forgotten the testimony of Sporgeon when the court said that Sporgeon was to blame for not using blocks. We have

then this situation, namely: what would the court have done, if the court had had the right idea of the degree of care required, and also what would the court have done, if his honor had not forgotten that the plaintiff demanded snatch blocks and was refused. We think we are justified from the testimony to reason that it was the defendants who used a lag screw for that for which it was not intended. Such a screw was dangerous no matter for what purpose it was used.

Variance.

It is argued in all sincerity that the variance between the pleadings and the proof prevents the plaintiff from any recovery.

We contend that there was no variance. We call the court's attention to what the defendants claim is a variance. The defendants claim:

> *"The alleged negligence cannot be considered as it is not within the issue."*

This is the reason given in plaintiff's brief on page 33:

The negligence of the mate in not furnishing the plaintiff with a snatch block was within the issues as well as the dangerous condition of the ringbolt.

The answer sets out that the plaintiff was injured because he did not use a snatch block. (T. 15.) There was at no place any objection to any testimony having reference to snatch blocks. The testimony about snatch blocks was so fully considered as

if the pleadings, the complaint as well as the answer, had dealt with it.

> "Issues may be raised not only upon the complaint but also upon new matters in the answer."
>
> *Rogers v. Riverside Land Co.,* 132 Cal. 9; 64 Pac. Rep. 95.

Our Code C. P., Sec. 590, provides:

> Issues may be raised:
>
> (1) Upon material allegations in the complaint.
>
> (2) Upon new matters in the answer.

Even if the defendants had not raised the matters of not using snatch block in the answer, since it was used on the trial without any objection, the matters about variance cannot be argued.

It is well expressed by the Eighth C. C. A. in the case of *United Kansas Portland Cement Co. v. Harvey,* 216 Fed. 316. The citation is from page 319:

> "In Derham v. Donahue, 155 Fed. 385, 83 C. C. A. 657, 12 An. Cas. 372; this court held that under the statute of Jeofails (Sec. 954 R. C.) where the defendant could not have been mislead in his preparation for trial, it is the duty of the court to permit an amendment, if necessary. As stated in Reynolds v. Stockton, 140 U. S. 254, 266, 11 Sup. Ct. Rep. 773, 35 Law Ed. 464, in speaking of a case in which while the matter was not, in fact, put in issue by the pleadings, but evidence had been introduced by both parties and the matter actually litigated.
>
> "In such a case the proposition so often affirmed that that is to be considered as done

which ought to have been done, may have weight, and the amendment which ought to have been made to conform the pleadings to the evidence may be treated as having been done."

The revised codes, sec. 954, is sec. 1591 of the C. Stat., United States, and reads as follows:

"No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any part of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matters of law shall appear to it, without regarding any such defect, or want of form, except those which, in case of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."

31 *Cyc.* 703 says:

"It has been decided in a number of cases that a variance to be material must be such as to mislead, or surprise the adverse party."

Sec. 469 *C. C. P.* provides:

"No variance between pleading and proof is deemed material, unless it has actually mislead the adverse party. Whenever it appears that a party has been mislead, the court may order the pleading to be amended, upon such terms as may be just."

There is no variance between pleading and proof: The complaint says:

> "The said defendants, acting by and through the said managing owner, and by and through the officers in charge of said vessel, failed and neglected to keep the said vessel and its appliances in a reasonable safe condition."

We are at a loss to understand how this can be a variance when it is shown in the testimony that the bolt was so "loose", that, to use the expression of the judge who tried the case "they are liable to turn and screw out and the friction is likely to tear them loose, as was done in this case". (T. 76.) It must seem strange for a reasonable person when it is contended that this appliance was an ordinary safe appliance. It was this kind of appliance that a witness, Capt. Lancaster, for the defendants, referred to when he said: "They are not proper bolts in deck construction". (T. 55.) It was in deck construction right on the poop deck that this bolt was located. (T. 36, the drawing of the vessel's deck.)

When you look at the drawing take notice how difficult it is to believe that the ringbolts are used for the purpose of fastening the booms, because they are to one side of the boom rest, and too far away for that purpose.

Many old cases are cited in the brief of the respondents in order to show that no liability is incurred in the event that the plaintiff is improperly using an appliance. But this plaintiff comes under

the railway employer's liability law which applies to seamen and the Supreme Court of the United States has passed on the Jones' Act, and under that act contributory negligence is no defense, even if it was negligent to use a bolt that looked so strong that you could moore the court house to it, but which in fact was so weak that it might come out by itself.

The master knew that this bolt was improperly fastened, and the liability in such cases is well stated in *Henry Gillens Sons Lighterage Co., Inc. v. Fernald,* (1923) Sec. C. C. A., 294 Fed. 520, citation from page 522:

> "The owner cannot escape liability because another of his crew failed to repair with material at hand so obvious a defect which rendered the lighter plainly unfit for the contemplated work."

Again the same court says:

> "The seamen were bound to use the equipment at hand and appliances which the owner furnished, and they were on their part bound to furnish and maintain equipment and appliances for the seamen to use at least free from defect known or which ought to be known."

We respectfully ask that a new trial be granted.

Dated, San Francisco,
November 18, 1925.

Respectfully submitted,

S. T. Hogevoll,

Attorney for Plaintiff in Error.